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In The

Supreme Court for the United States

October Term, 1997

BRUCE BUCHBINDER, et ux.,

Petitioner,

v.

FRANCHISE TAX BOARD, et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE BUCHBINDER
ELAINE BUCHBINDER
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054
Petitioners In Pro Se

58 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court's order dismissing the action for lack of jurisdiction where:

(a). the United States District Court failed to discern the distinction between the jurisdictional issues petitioner raised for adjudication and issues of constitutionality as perceived by the court relative to state direct taxation of income, and where the Tax Injunction Act that barred petitioners' claims before the court did not apply to petitioners' persona, the court being without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and,

(b) the United States Court of Appeals gravely erred by affirming the lower court's order dismissing the action over the issue of substantibility, in that the state was a party in interest to the outcome of the controversy, and in that the outcome of petitioners' case in a federal related matter attached to the instant case, these issues being substantial issues leading to an issue of violation of petitioners' Right to due process secured by the Constitution for the United States of America.

2. Does the arbitrary dismissal of petitioners' cause of action before the United States District Court and the Ninth Circuit Court of Appeals constitute a denial of proper due process and right to meaningful access to the courts, in light of the circumstances as a whole in the instant case?

3. Is federal jurisdiction proper for a case where the petitioner has a secured Constitutional Right to due process, pursuant to Amendment V of the Constitution for the United States of America, such as in the instant case?

4. In that the Tax Injunction Act and Eleventh Amendment did not apply to petitioners' persona, was petitioner justified in invoking its due process Right under the Constitution for the United States of America, and raising a Federal Question of due process right violation in response to state authorities violating that right, especially when those state authorities have quasi-judicial, legislative and executive powers, and especially in that the state authorities are a party in interest to the outcome of the controversy in the instant matter?

5. Can one Amendment of the Constitution of the United States of America deny to a citizen, a Right guaranteed under another Amendment, in a cause of action where the Eleventh Amendment used to support respondent's motion to dismiss would deny petitioner of a guaranteed due process Right under Amendment V, and especially where the Amendment denying the right did not apply to petitioners' persona in the first place?

6. Is Statutory Law used to defeat constitutional law in cases raising federal questions of due process right violations, such as in the instant case, unconstitutional and of no effect?

7. Is federal jurisdiction proper for a case where issues of law and fact in a related federal judiciary proceeding are controlling, in that the state follows federal judiciary outcome in matters of direct taxation of income, such as in the instant case; in that respondent defaulted by waiver in the related federal judiciary proceeding touching the instant case?

8. Does the waiver issue in a related federal case, attach to the instant case in that the state follows federal judiciary outcome in matters pertaining to direct taxation of income, giving the federal judiciary jurisdiction in the matter?

9. Is federal jurisdiction proper for a case raising the waiver issue, having its nexus in federal judiciary proceedings, properly denominating such a case for federal subject matter jurisdiction, such as in the instant case?

10. Is federal jurisdiction proper for a case where federal law is the basis of the action at the state level, and does this circumstance constitute a waiver of the Tax Injunction Act 28 U.S.C. 1341 and vice versa relative to 26 U.S.C. 7421; and where federal law is the basis of state direct taxation of income is it therefore an exception to 28 U.S.C. 1341?

11. Does the federal judiciary have original jurisdiction pursuant Article III, Section 2, Clause 1, in such cases as the instant case, in that the state follows the federal judiciary outcome in matters of direct taxation of income, creating an exception to the Tax Injunction Act?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), Petitioner lists the parties to the proceeding in the court below as follows:

Plaintiffs-Appellees

Bruce Buchbinder
Elaine Buchbinder

Defendants-Appellants

Franchise Tax Board, State of California
Board of Equalization, State of California

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PRELIMINARY STATEMENT

Petitioner Bruce Buchbinder and Elaine Buchbinder, who are not trained in the complexities of legal practices, hereby petition for a Writ of Certiorari, to the United States Court of Appeals for the Ninth Circuit, for the purpose that a supervisory opinion may issue from this Honorable Court, reviewing the actions of the United States District Court, and the United States Court of Appeals for the Ninth Circuit.

The relief sought results from the subsequent ruling of the District Court and the Ninth Circuit Court of Appeals, which have effectively and substantially denied petitioners' constitutionally protected and secured right to Redress of Grievance and Due Process.

Additionally this case involves an issue of a waiver filed in a previous Supreme Court case, *Buchbinder v. Commissioner of Internal Revenue*, 114 S. Ct. 696; 126 L.Ed 2d 663, to which the instant case is related in that the state follows federal judiciary outcome in such matters, wherein respondent in the previous case, knowingly and without coercion, waived its right to file in the face of petitioners' asserted facts and conclusions; respondent thereby defaulting by waiver, pursuant to Supreme Court Rule 15.5. This issue also involves a question of whether such waiver attaches to the instant case from the previous case above referenced.

The Petitioner, in appearing pro se, relies on *Haines v. Kerner* (1972), 404 U.S. 519, *Price v. Johnson* (1948), 344 U.S. 266, plus many others, in that "pro se," "pro per" litigants are not held to the same standards as attorneys, appearing on 'appeal' in this Court.

OPINIONS BELOW

The Order of Court of Appeals for the Ninth Circuit has not been reported. It is copied and attached to the appendix hereto, APP. A, *infra*. The Order Dismissing Action of the United States District Court has not been reported. It is copied and attached to the appendix hereto, APP. B, *infra*.

JURISDICTION

The Franchise Tax Board's Notices of Additional Tax Proposed to be Assessed issued to the Buchbinders on September 21, 1983. Thereafter, it was agreed to hold the case in abeyance pending resolution of a related Tax Court case and that the appeal be deferred pending the outcome of said case before Tax Court; the State Board of Equalization agreeing to defer further proceedings in the matter pending the related court action. Upon resolution of the federal matter, the State Board reopened the case, not cognizing the implication of the waiver issue inherent in the federal proceeding. Subsequently, the petitioner filed a timely petition to the Board of Equalization. The final determination of the Board of Equalization was entered on June 26, 1997. Thereafter, the Buchbinders filed a timely petition with the United States District Court raising a federal question of violation of due process rights. The respondent by motion and memorandum argued for dismissal of the Buchbinders' appeal for failure to state a claim citing to the Tax Injunction Act and Eleventh Amendment. The Order Dismissing Action of the Court was entered on November 24, 1997. The Buchbinders then filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals. The case was filed and docketed and a Time Schedule Order was issued by the court. However, before the Buchbinders could submit their opening brief, the court clerk raised the issue of 'substantibility' and ordered the petitioner to show cause why the judgment in the

appeal should not be summarily affirmed. The order of the court affirming the Order Dismissing Action of the District Court was entered on February 26, 1998, with no further filings permitted.

Jurisdiction in the instant case is established under the Preamble to the Constitution for the United States of America, wherein it specifies responsibilities of the government for whom the judges of this Land now labor under oath of office.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

Authority to proceed in this Court is by authority of the people of the united States by their Constitution, Article III section 2, clauses 1 and 2 in which this Court has Appellate Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Preamble to the United States Constitution

The Preamble to the United States Constitution provides:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Articles to the United States Constitution

Article III, Section 2, Clause 1 provides in pertinent part:

> The judicial Power of the United States, shall be

> vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV, Section 2, Clause 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

Amendments to the United States Constitution

Amendment I of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V of the United States Constitution provides in pertinent part:

> No person shall.... be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case arose on September 21, 1983, when petitioner received a Notice of Additional Tax Proposed to be Assessed from the Franchise Tax Board. Petitioner filed a protest to the Notice on November 16, 1983. Subsequently, petitioner received a Notice of Action on June 10, 1987, stating that if petitioner did not agree with the Notice, petitioner could file an

appeal with the State Board of Equalization. On or about July 31, 1987 the State Board acknowledged an appeal had been filed, and it was later agreed that this case was to be held in abeyance pending federal judiciary outcome of a related federal matter and court action. Such related matter ultimately resulted in petitioner appealing its federal case to the United States Supreme Court in *Buchbinder v. Commissioner of Internal Revenue*, 114 S. Ct. 696; 126 L.Ed 2d 663, leading to issues bearing on the instant matter; in particular, the waiver issue.

Petitioner alleged before the State Board that the waiver in the above referenced case attached to the instant case and therefore, in that the state follows the outcome of the federal judiciary in matters of direct taxation of income, it followed that the matter was resolved upon the issue of the waiver, that being the primary threshold issue in the instant case. (Petitioner would later contend in taking its case before U.S. District Court that this issue was one of the main issues that made the instant case proper for federal jurisdiction and determination.)

A secondary issue brought before the State Board of Equalization was the issue of jurisdiction, wherein petitioner challenged the Franchise Tax Board and State Board's jurisdiction and alleged that personam jurisdiction relative to the matter had been invoked by fraud.

The State Board of Equalization ignored petitioners' specifically worded issues and denied any review on any of those issues, other than to raise their incredulousness on the issue of the waiver, and thereafter issued their arbitrary and capricious decision on April 10, 1997.

On May 5, 1997, petitioner filed a Petition for Rehearing to the State Board and in its Petition for Rehearing, petitioner took issue with the State Board's determination, and pointed out to

the Board material points of law and fact overlooked in their decision. Nevertheless, the State Board on June 26, 1997 denied the Petition for Rehearing and affirmed its order of April 10, 1997.

Petitioner, subsequently on September 23, 1997, filed a Petition for Judicial Determination and Declaratory Judgment on Issues of Law in United States District Court for the Northern District of California, invoking its Due Process rights under Amendment V, on the jurisdictional grounds that the U.S. District Court was the proper forum for its grievances, in that petitioner had exhausted all administrative appeals with the State Board of Equalization, citing authority to proceed in that court by authority of the people of the united States by their Constitution, Article III, Section 2, Clause 1, in which the court had original jurisdiction; petitioner thereby exercising its secured Right to petition for Redress of Grievance pursuant to Article IV, Section 2, Clause 1, Amendment I, and IX of the Constitution for the United States of America. The petitioner took the appeal from the final decision entered by the State Board of Equalization, raising a case and controversy arising under the Constitution for the United States, therefore the case was properly brought before the court under the provisions of Article III, Section 2 of the Constitution for the United States, and was entitled to be treated as such. As a result of the constitutional nature of the case, it was entitled to be reviewed by Judges completely endowed with the powers and immunities of Article III, Section 1 of the Constitution. This Constitutional guarantee of review was an impossibility before the State Board of Equalization, and completely denied the Buchbinders' full Due Process of the Law. None of the legal and factual issues raised by the Buchbinders were given any substantial legal analysis by the State Board nor was a well-reasoned conclusion relative to these issues entered by the Board.

Petitioner claimed in its petition to the U.S. District Court that:

1. Petitioners' appeal to the State Board raised more than a single argument, involving mixed questions of law and fact, of Constitutional import, that were not properly addressed in the decision issued by the State Board of Equalization, in particular the issue of the Franchise Tax Board not informing petitioner of the nature of the "Excise Taxable Activity" it was involved in to create a basis for a proper and valid assessment. Specifically, the Franchise Tax Board did not inform petitioner WHAT Excise Taxable Activity it was involved in that would create an "income tax liability" to provide a basis for a proper and valid assessment.

2. Petitioners' appeal to the State Board also raised the waiver issue, accompanied by supporting documentation, and the State Board's decision did not reflect an adequate review of this issue, nor the other issues raised by petitioner.

3. In its Memorandum of Decision, filed April 10, 1997, the State Board reduced petitioners' multiple arguments to a single issue, namely whether petitioner presented <u>any</u> evidence showing that the Federal Government truly waived the related assessments, and further arguing that the Franchise Tax Board's assessments were not based upon Federal assessments, but rather based upon the Franchise Tax Board's own audit of petitioner, ignoring the important issue of WHAT constitutes a valid and proper assessment relative to the Franchise Tax Board's failure to identify the "Excise Taxable Activity" that would provide such basis, and thus keep State statutes in harmony with Federal statutes relative to taxation of income; this being the basis of petitioners' claim that said assessments were in error. Further, petitioner in raising its contentions, was arbitrarily characterized as raising frivolous arguments by the State Board, arguments the State Board characterized as not

being supported by the statutes and cases cited by petitioner in its Reply Brief; this characterization being patently UNTRUE. This arbitrary and unfair treatment of petitioner gave the State Board of Equalization the excuse to deprive petitioner of any legal analysis to the arguments raised by petitioner in its Reply Brief, and pre-empted the State Board from producing any evidence to the contrary. Therefore, the State Board, because it perceived the petitioner as having failed to present any evidence demonstrating that the Franchise Tax Board's assessments were erroneous, when in fact petitioner documented the fact that the state personal income tax was in the nature of a corporate income tax and thus not applicable to the petitioner, and therefore lacking in personam jurisdiction and grounded in fraud; nevertheless the State Board took it upon itself to unjustifiably characterize petitioners' unpopular contentions as being frivolous and without merit, thus depriving petitioner of proper Due Process of Law.

4. Petitioner alleged its arguments were neither unitary nor so simple as that characterized by the State Board's decision. To the contrary, petitioner argued, among other things, that the Franchise Tax Board had not identified the "Excise Taxable Activity" that would give proper and valid basis to the assessment, and that the state personal income tax was either a direct tax or indirect tax like the federal income tax, citing to *Pollock v. Farmers Loan and Trust*, 158 U.S. 601 and *Eisner v. Macomber* (1920), 252 U.S. 189; the enabling legislation of the Tax Codes being, *The Corporate Excise Tax Act of 1909* (36 Stat S ch. 11, 12) ; limited by restrictions placed by the Constitution, and in the nature of a corporate income tax. Petitioner further contended that the Franchise Tax Board had not identified that activity which petitioner was involved in that created the so-called "income tax liability", further arguing that such cannot be based on what was previously done in former years, as previous filings may have been actually in error due to

fraud and extortion demands made upon petitioner by the Franchise Tax Board ab initio, relating to some pretended requirement of filing returns; and that a liability was not created by a demand to file a return, or that a return was filed previously, or that conditions of former years apply automatically in the present year or any subsequent year. The petitioner further arguing, that the California Courts and the State Board of Equalization itself, had declared that the "Franchise Tax" is based on the Profit made within the taxable year because it was a corporation, citing to *American Water States Service Co. of California v. Johnson* (1939), 31 Ca 2d 606, 88 P2d 770; *West Publishing Co. v. McColgam* (1946), 27 C2d 705 aff'd 328 U.S. 823; *Rosemary Properties* (1947), 29 C2d 677, and in particular showing to the State Board that in the Appeal of *Thor Electronics, Inc*, Cal. St. Bd. of Equal, Feb. 4, 1975, the State Board clearly stated on February 4, 1975, that "the franchise tax is not a tax on property or income; it is an excise tax on the privilege of exercising the corporate franchise which is measured by the corporation's net income"; petitioner further showing to the State Board, that it was declared that income meant corporate profits and that the tax was based upon the benefit of exercising the corporate privilege, measured by the corporate profit, citing to *Merchants Loan and Trust v. Smietanka* (1921), 255 US 509 wherein the High Court stated:

> "It is obvious that these decisions in principle rule the case at bar if the word 'income' has the same meaning in the Income Tax Act of 1913 that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was ~~in~~ effect decided in *Southern Pacific v. Lowe*, 247 US 330, 335 ... where it was assumed for the purposes of decision that there was no difference in its meaning as used in the Act of 1909 and in the Income Tax Act of 1913 (38 Stat 114). **There can be no doubt** that

> the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913. When to this we add that in *Eisner v. Macomber, supra*, a case arising under the same Income Tax Act of 1916 which is here involved, the definition of 'income' which was applied was adopted from *Stratton's Independence v. Howbert, Supra*, arising under the Corporation Excise Tax Act of 1909, with the addition that it should include 'profit gained through the sale or conversion of capital assets,' **there would seem to be no room to doubt** that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court." At 519 (Emphasis added).

And, further citing to the Tennessee Supreme Court in *Cole v. Macfarland*, wherein that High Court stated:

> "Legislature can name any privilege a taxable privilege and tax it by means other than an income tax, but the legislature cannot name something to be a taxable privilege unless it is first a privilege... 'Privileges are special rights, belonging to the individual or class, and not the mass; properly, an exemption from some general burden, obligation or duty; a right peculiar to some individual or body.' *Lonas v. State 50 Tenn.*, 287, 307. Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as a privilege." 337 S.W. 2d 453,455,456.

5. Further, petitioner raised the waiver issue, which had a determining effect on the instant case in that the State follows

the Federal findings, subject to Federal Judiciary outcome ; and furthermore touching the issue of whether the federal tax assessment had been paid, petitioner bringing to the State Board's notice, that since the Federal Government defaulted pursuant to waiver, and the Federal Government, based on its default, and its attempts to further the action blocked by Estoppel in Pais, Estoppel by Laches and Collateral Estoppel; therefore, there were no grounds for the Federal tax assessment, the Federal Government being estopped from further collection activity in this matter. Therefore, petitioner alleging the matter was resolved in that the State follows the outcome of the Federal Judiciary in these matters, this matter was resolved upon the issue of the waiver, that being the threshold issue in the instant case. However, relative to this matter, the State Board chose to ignore this important principle of law; nevertheless, the State Board's disregard of the waiver issue in no respect denigrated the issue nor did it eliminate it. In fact, the State Board's ignoring this issue raised a multiplicity of other issues impinging upon U.S. Constitutional Law, in particular the issue of Redress of Grievance and Due Process, this touching the relationship between Federal and State Law, and the relationship between the Internal Revenue Service and the Franchise Tax Board, among other things.

6. Consequently, under authorities cited in petitioners' brief and based on its peculiar factual situation, petitioner contended therein that its proper legal status was that of non-taxpayer, and that the assessment in question was false and therefore not valid. Given that status and circumstance, petitioner logically concluded that there were no grounds for the deficiency assessment made by the Franchise Tax Board. Furthermore, notwithstanding anything to the contrary, the State Board's decision ignored, the relevant issue of the waiver, briefed extensively in petitioners' reply brief, and documentation in a full- blown "Exhibit" to the brief, containing all relevant

information, concerning this matter.

7. None of the pertinent issues advanced by petitioner were adequately addressed in the Memorandum of Decision issued by the State Board, thus resulting in the affirmation of the Appeal in favor of the Franchise Tax Board, and in violation of petitioners' Due Process Rights.

8. Having collapsed all of petitioners' substantive arguments, and its contention of case law as well, into the single proposition that petitioner did not present any evidence that the Federal Government truly waived the related assessments and that all the arguments made by petitioner were frivolous, the State Board's Memorandum of Decision necessarily left unanswered and unaddressed essentially all of petitioners' material points of law and fact which petitioner had actually raised in its brief; including the relevant waiver issue.

In addition to the above claims made in its petition to the U.S. District Court, petitioner further claimed it had not received the Scope of Review that it was entitled to under State equivalent Statutes to the Administrative Procedures Act, Title 5, Section 706, and other State Statutes and Government Codes enacted to protect petitioners' Due Process Rights pursuant to Amendment V of the United States Constitution, to effect harmony between Federal and State law regarding the matter of Due Process; whereas the United States Constitution is the Supreme Law of the Land (See U.S. Constitution, Article VI, Section 2) and recognized as the Supreme Law of the Land by the California Constitution, in Article III, Section 1.

On October 9, 1997, while petitioners' Petition to the United States District Court was pending, respondent filed a Notice of Motion to Dismiss Complaint and a Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint. In its

memorandum supporting its motion, respondent cited to the Tax Injunction Act and the Eleventh Amendment further citing to the Seminole Indian case. Petitioner opposed the Motion on the grounds that the Tax Injunction Act and Eleventh Amendment did not apply to petitioners' persona in the instant matter.

With reference to the Tax Injunction Act, petitioner had brought before the lower court an action seeking a determination of rights and due process. Respondent opposing petitioner, claimed the lower court lacked jurisdiction in the matter, and in support of its motion to dismiss the instant case from the lower court cited to the Tax Injunction Act and Eleventh Amendment. However, petitioner pointed out the Tax Injunction Act lacked jurisdiction over it, because no tax liability had ever been established; therefore, there was no tax to injunct. Further pointing out as such, respondent's arguments were unsupported and irrelevant and did not apply to petitioner; therefore respondent's arguments did not support its motion to dismiss. The record of the federal courts in enforcing civil rights made respondent's position a confusing position in this regard unless the Tax Injunction Act set aside the provisions of the Bill of Rights, and the rulings of the Supreme Court in *Fisher*, *Doe*, and related circuit cases such as *Smith v. Richert*. See *Fisher v. U.S.*, (1976) 425 U.S. 391; *United States v. Doe*, (decided 2-28-1984) S.Ct #82-786; and *Smith v. Richert*, (7th Cir. 1994) 35 F. 3d 300. Petitioner pointing out that due process violations are not protected by the Tax Injunction Act nor the Eleventh Amendment, and fall within the domain of 42 U.S.C Section 1983, a mandate upon the Federal Courts to protect constitutional rights.

Petitioner originally raised issues of a jurisdictional nature at the state level, that went to the taxing power of respondent in the instant case. Jurisdiction once challenged is to be proven by the party attempting to assert jurisdiction (in this case the

respondent). The burden of proof of jurisdiction lies with the asserter. (See *McNutt v. GMAC*, 298 U.S. 178, 189. The origins of this doctrine of law may be found in *Maxfield's Lessee v. Levy*, U.S. 308. "He who asserts jurisdiction, upon challenge to same, must plead and prove it"; *McNutt v. GMAC*, (1936) 298 U.S. 178, 189: 56 S. Ct. 780; 80 L. Ed. 1135; *Griffin v. Matthews*, 310 F. Supp. 341, aff'd. 423 F. 2d 272; *Thompson v. Gaskell*, (1942) 315 U.S. 442, 446; 62 S. Ct. 673; 83 L. Ed. 1111; and is so limited that even the plaintiff can plead absence of jurisdiction if the ruling is adverse to him and shall prevail *American Fire and Casualty v. Finn*, (1950) 34 U.S. 6, 18; 71 S. Ct. 534;95 L. Ed. 702; 19 ALR 738 and so may a defendant, even if a case is litigated to the end and a judgment rendered, *Bialack v. Harsh*, (1973) 463 F.2d 1185, 1186 (9th Cir. 1972 cert. den. 1973), 409 U.S. 1060, reh. den. 410 U.S. 948. That jurisdiction can be challenged at any time, is a well settled precept of law. Upon a square challenge, jurisdiction cannot be assumed and remains an open question. *Maine v. Thibutout*, (1979) 448 U.S. 1.

Since jurisdiction was still an open question in the instant case, the tax liability alleged by respondent was not established and the issue of tax collection was moot. Before collection of taxes, the court had to decide if such collection was lawful and if there was a lawful tax liability by adjudicating the question of jurisdiction.

Therefore the pretense of injunction, enjoinment, suspension, restrainment or interference as relates to state revenue collection procedures was out of place and without merit, in addition to being blatantly presumptuous. The lower court was without evidence that the Tax Injunction Act applied to petitioner; therefore the judge must have relied on extra record, heresay material that the Act applied to petitioner. The Tax Injunction Act not operating upon petitioner in the instant

case -- as there was nothing to enjoin the UNLAWFUL collection of tax. The Tax Injunction Act only operates for the lawful collection of tax; however, there was no certifiable evidence of a lawful tax in the instant case as respondent had not presented any certifiable evidence of a lawful tax, and the court was without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter.

The Tax Injunction Act not applying to petitioner because no tax liability had ever been established; petitioner contesting respondent's jurisdiction on the basis that personam jurisdiction had been invoked by fraud; and respondent not objecting in a timely fashion to petitioners' claims, the claims were deemed admitted pursuant FRAP 8 (d); thus tax liability not having been established and jurisdiction contested and still an open question, there was no tax liability nor tax to enjoin pursuant to the Tax Injunction Act. Therefore, the Tax Injunction Act was a moot issue and should never have been cited by respondent in the instant matter.

The other argument raised by the respondent involved the Eleventh Amendment and a cite to the Seminole Indian case. With respect to the Eleventh Amendment, respondent misled the lower court citing to the Seminole Indian case, as that case did not fit the fact pattern of the instant case that was before the court. The Eleventh Amendment and provisions thereto were not the issue in the instant case, as the Seminole Indians do not have an agency relationship with the federal government with respect to tax matters. The citation on the Seminole Indian case was an obvious attempt on the part of the respondent to mislead the lower court. Petitioner is not a Seminole Indian of the Seminole Indian tribe. Said Seminole Indians and Seminole tribe exist under separate jurisdiction [Foreign State jurisdiction]. Petitioner is not within Seminole Indian tribe

jurisdiction nor pled to such jurisdiction, nor to their immunities or protections. Petitioner is domiciled in the State of California, and therefore, is not Citizens of another State or Foreign State. Petitioner was bringing suit against the State wherein petitioner is domiciled, and unlike the Seminole Indians and Seminole Indian tribe is not domiciled in a State foreign to the States united, but is a Citizen of one of the several Sovereign Republican States of the contiguous States united by the Constitutional compact of the United States of America. Therefore the issue of the Eleventh Amendment was a moot issue and should never have been cited by respondent in the instant matter.

The Order Dismissing Action of the District Court was filed on November 24, 1997. In the Order the judge granted the respondent's motion on the grounds that petitioners' claims were barred by the Tax Injunction Act, and brought up the issue of constitutionality, thus confusing the issues raised by petitioner. The judge erred in bringing up the issue of constitutionality of taxes, when in fact nowhere in the pleadings did petitioner raise that particular issue. Petitioner would like to point out that they never challenged the constitutionality of the state's taxing power; their challenges were instead jurisdictional in nature -- jurisdiction being the threshold issue.

On December 17, 1997, petitioner timely filed a Notice of Appeal to the Ninth Circuit Court of Appeals. On December 24, 1997, the Ninth Circuit issued a Time Schedule Order setting April 6, 1998 as the filing date for petitioners' opening brief. However, in the interim, on January 17, 1998, the deputy clerk of the Ninth Circuit issued an order on behalf of the clerk of the court to petitioner stating therein that in her view the appeal might be proper for summary disposition because the questions on which the decision in the appeal depended might be so 'insubstantial' as to not justify further proceedings and

ordered the petitioner to show cause why the judgement in the appeal should not be summarily affirmed.

On January 29, 1998, petitioner filed a response to the clerk's order, showing the substantial nature of the issues raised by petitioner. In their response the petitioner showed to the court among other things, that the U.S. District Court was the proper court for subject matter jurisdiction in the instant case as the waiver issue raised by petitioner was an issue rising out of federal judiciary proceedings; and being that the waiver issue had its nexus in the federal judiciary process, the federal courts were best suited to deal with it; the waiver issue being a complex and delicate question having its nexus in the federal judiciary process, petitioner arguing that if this question was to be properly addressed, it had to be addressed on the federal level; petitioner contending that no state court was proper venue for complex questions of law and fact raised by petitioner, such as the waiver issue in the instant case.

Further, petitioner contending the case was a proper case for federal court jurisdiction because the United States Constitution is the Supreme Law of the Land and the ultimate arbitrator on issues of Due Process; petitioner further contending statutes involving federal income tax are the controlling law and state law is subordinate, in that the state follows federal judiciary outcome in matters pertaining to direct taxation of income, as in the instant case.

Petitioner contending that the case was not a proper case for the state court system in that the state was a party in interest, and that notwithstanding anything to the contrary, the petitioner had exhausted all administrative remedies on the state level and that the state lost primary jurisdiction in the instant matter because of due process violation and therefore, it would be futile to exhaust any further remedies on the state level.

In the order issued by the deputy clerk of the Ninth Circuit on January 17, 1998, petitioner was given twenty-one (21) days from the date of the order to file a response, and respondent was given ten (10) days from the date of service of the response to file a reply to petitioners' response. Petitioner timely filed their response to the clerk's order on January 29, 1998. However, respondent did not reply and rebut petitioners' claims and assertions, and therefore such claims and assertions are deemed admitted pursuant FRAP 8 (d).

Nevertheless, on February 28, 1998, the Ninth Circuit summarily affirmed the District Court's Order of November 24, 1997, arbitrarily and capriciously dismissing the action for lack of jurisdiction without opinion, with no motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions permitted.

REASONS FOR GRANTING WRIT

Petitioner in coming before the federal court system, invoked jurisdiction of the lower courts pursuant to the United States Constitution, Article III, Section 2, Amendment I and Amendment V, petitioner having raised a Federal Question involving petitioners' Right to due process secured by the Constitution for the United States of America.

The questions raised in this appeal by petitioner involve a matter of due process and a question as to whether statutory law used to defeat constitutional law in cases raising federal questions of due process right violations, is unconstitutional and of no effect, i.e. whether a statute or act such as the Tax

Injunction Act can preclude petitioner from a constitutionally guaranteed right to due process secured by the Constitution for the United States of America. Further there is a question of whether the Tax Injunction Act that barred petitioners' claims before the lower court even applied to petitioners' persona because of jurisdictional issues raised by petitioner from the beginning (this being an issue of contention). As such this question is a question of paramount importance, and in that the lower courts did not do their duty and hear the question, it adversely impacted the due process right of petitioner in this matter.

Neither the Tax Injunction Act nor Eleventh Amendment apply to petitioners' persona as the lower court was without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and as to the Eleventh Amendment and cite to the Seminole Indian case, it did not fit the fact pattern of the instant case as the Eleventh Amendment was not at issue and petitioners were not Seminole Indians. As the Tax Injunction Act and Eleventh Amendment were the only grounds for respondent's motion to dismiss, therefore respondent's motion was groundless and without merit and as such defective and the lower court (here the U.S. District Court) should never have granted it, nor should the Ninth Circuit have affirmed the lower court's order. Further, the District Court judge confused the issues by characterizing the jurisdictional issues petitioner had raised as constitutional tax issues. In light of these errors and the controversial waiver issue in petitioners' federal related case, and in that the state was a party in interest to the outcome of the controversy, the lower court's action and the Circuit Court's affirmation clearly constitutes a denial of Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the courts.

The Congress of the United States has granted jurisdiction to the lower federal courts over the issues raised in petitioners' petition with respect to both state and federal issues pursuant to 28 U.S.C., paragraphs 1331, 1332, and 1333 [savings to suitors clause]. But more importantly, the Constitution for the United States of America, and the Constitution for the State of California demand that these courts enforce the laws of the United States as enacted by Congress to preserve Constitutional Rights, and Civil Rights, as well as to due process.

In an article touching on this subject, written by Albert J. Schweppe, in the American Bar Association Journal, Vol XXIV No. 6, June 1938, entitled "What Has Happened to Federal Jurisprudence", Mr. Schweppe made the following point:

> "At least, a Federal Court sitting in a particular state is just as much a court of final adjudication as is a state court, and such a Federal Court is quite as competent to determine the law of that particular state as is a State Court. This the Constitution clearly intended; and a Federal Court cannot escape this duty, whether the local law be clearly declared on the particular point or not, and even if it not be declared at all."

This petitioner had no remedy at law at the state level as was demonstrated by the inability of the State Board to adequately address the issues brought before it, such issues involving mixed questions of law and fact by which the historical facts had to be concluded before the applicable law could be applied; involving a subcategory of the mixed question doctrine, which is a "Constitutional fact" question involving applications of constitutional principles to the factual determinations; involving important questions concerning the scope and meaning of United States Supreme Court decisions, relative to the issue of

taxation touching both federal and state taxing systems, thus three substantial questions, that all had to be reviewed together before just findings and conclusions can be arrived at in the instant matter.

Further, the questions raised in this appeal involve a question as to whether the outcome of petitioner's case in a federal related matter attaches to the instant case, and whether issues of law and fact in that related federal judiciary proceeding are controlling in the instant case. Significantly, such issues include the waiver issue involving a question of paramount importance. In this regard, petitioner initially apprised the Franchise Tax Board and the State Board of Equalization that issues relating to the year in question, had been litigated in a federal related case in United States Tax Court, and that the decision of the Tax Court had been appealed to the United States Court of Appeals for the Ninth Circuit, and subsequently to the United States Supreme Court and that upon appeal to the Supreme Court, the respondent in that federal related case had defaulted pursuant to waiver; petitioner claiming that the waiver in face of petitioners' asserted facts and conclusions served to leave petitioners' allegations uncontested before the Supreme Court, thereby leaving respondent unable to later act in contravention to those allegations leaving no grounds for further action in the matter, petitioner claiming a default judgement against respondent in that related case; and in that respondent in that case did not object to petitioners' claims, petitioners' claims were deemed admitted pursuant FRAP 8 (d), all touching the instant case. Upon apprising the Franchise Tax Board and State Board of Equalization of this, they responded with incredulousness, apparently not being able to cognize the issue. However, nonetheless, the State Board's ignoring this issue raised a multiplicity of other issues impinging upon U.S. Constitutional Law, in particular the issue of Redress of Grievance and Due Process, this touching the relationship between Federal and

State Law, and the relationship between the Internal Revenue Service and the Franchise Tax Board, among other things.

The instant case was a proper case for federal court jurisdiction not only because the state follows federal judiciary outcome in matters pertaining to state direct taxation of income, but also because the waiver issue was the primary issue raised by petitioner before the State Board of Equalization. The waiver issue is a complex and delicate question that had its nexus in the federal judiciary process in a federal related case to the instant case, and if this question was to be properly addressed it had to be addressed on the federal level due to the nature of the issue. Therefore, no state court was proper venue for complex questions of law and fact raised by petitioner, such as the waiver issue in the instant case.

On the other hand, the case was not a proper case for the state court system in that the state was a party in interest to the outcome of the controversy in the instant matter, and that notwithstanding anything to the contrary, the petitioner had exhausted all administrative remedies on the state level, and the state lost primary jurisdiction in the instant matter because of due process right violations, and therefore, it would have been futile to exhaust any further remedies on the state level.

The U.S. District Court below erred grievously in dismissing petitioners' cause of action. And the Ninth Circuit Court only served to compound the error. To remember the words of *Boyd v. United States*, (1886) 116 U.S. 616, 635 :

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be Obsta Principiis.

Invoking Obsta Principiis, this Court must exercise its supervisory powers to resolve a far reaching dilemma in judicial proceedings

There is a far-reaching dilemma that must be resolved in the instant case. An important issue that bears upon the supervisory role of this Honorable Court is the issue of the arbitrary dismissal of petitioners' cause of action before the United States District Court and Ninth Circuit Court of Appeals, and whether their action constitutes a denial of proper due process, and Right to meaningful access to the courts.

The question asks: does the arbitrary dismissal of petitioners' cause of action before the United States District Court and the Ninth Circuit Court of Appeals constitute a denial of proper due process and right to meaningful access to the courts taking into consideration the circumstances as a whole in the instant case?

This Court should grant certiorari in order to resolve this important issue and other issues that the lower courts refuse to address, in order that this petitioner receive a full and meaningful review and substansive due process as guaranteed to them as a secured Right of the Constitution for the United States of America.

CONCLUSION

Being that petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect their secured Constitutional Rights, thereby exercising their secured Rights; and especially in light of the controversial waiver issue

in petitioners' federal related case in that the state follows federal judiciary outcome in matters of direct taxation of income, and in that the state was a party in interest to the outcome of the controversy, and in that the Tax Injunction Act and Eleventh Amendment did not apply to petitioners' persona, and in that the judge confused the issues by characterizing jurisdictional issues as constitutional tax issues, the action of the lower courts in the instant case clearly constitutes a denial of petitioners' Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the Courts.

Since neither the Tax Injunction Act nor Eleventh Amendment applied to petitioners' persona, these being the only grounds for respondent's motion to dismiss before the U.S. District Court, therefore respondent's motion was groundless and without merit and as such defective, and the lower court should never have granted it nor should the Ninth Circuit have affirmed it.

Therefore for the reasons stated herein and in the record, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE BUCHBINDER
ELAINE BUCHBINDER
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054
Petitioners in Pro Se

DATED: May 21, 1998

APPENDIX A -- NINTH CIRCUIT ORDER SUMMARILY AFFIRMING DISTRICT COURT'S ORDER DISMISSING ACTION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER, ELAINE BUCHBINDER,	)	No. 97-17393
	)	DC# CV-97-20838-SW
Plaintiffs-Appellants,	)	Northern California
vs.	)	(San Jose)
	)	
FRANCHISE TAX BOARD, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	(Filed Feb. 26 1998)

Before: PREGERSON, CANBY, and LEAVY, Circuit Judges

Upon review of the record and appellants' response to this court's January 12, 1998 order to show cause, this court hereby summarily affirms the district court's November 24, 1997 order dismissing the action for lack of jurisdiction. See 28 U.S.C. §1341; National Private Truck Council v. Oklahoma Tax Commission, 115 S. Ct. 2351, 2354 (1995).

No motions for reconsideration, rehearing, clarification,

stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

AFFIRMED.

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APPENDIX B -- DISTRICT COURT ORDER DISMISSING ACTION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRUCE BUCHBINDER, and ELAINE BUCHBINDER, Plaintiffs, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA, and BOARD OF EQUALIZATION, STATE OF CALIFORNIA, Defendants.	CIVIL No. 97-20838 SW ORDER DISMISSING ACTION (Filed Nov. 24, 1997)

Pro se plaintiffs Bruce and Elaine Buchbinder ("Plaintiffs") initiated this action seeking a judicial determination and declaratory judgment on issues brought before the State Board of Equalization in connection with a Notice of Proposed Assessment from the Franchise Tax Board.

Defendants Franchise Tax Board and Board of Equalization ("Defendants") now move to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be

granted, pursuant to Federal Rules of Civil Procedure 12(b)(l) and 12(b)(6). For the reasons set forth below, the Court hereby GRANTS Defendants' motion and DISMISSES this action with prejudice.

I. Background

Plaintiffs invested in two tax shelters, "Financial Securities Corporation" and "Horticultural Research Ltd." In 1980, Plaintiffs claimed a $20,923 loss on their tax returns in connection with Financial Securities Corp., and in 1981 they claimed a $77,558 loss from Financial Securities Corp. and a $49,500 partnership loss from Horticultural Research Ltd. After an audit by the State Franchise Tax Board ("FTB"), those deductions were disallowed, and the FTB sent Plaintiffs a Notice of Additional Tax Proposed to be Assessed. In addition, an unsubstantiated 1980 $821 Schedule C deduction was disallowed.

Plaintiffs filed a protest to the Notice, and subsequently received a Notice of Action from the FTB. This Notice stated that if Plaintiffs did not agree with the Notice they could file an appeal with the State Board of Equalization ("SBE").

Plaintiffs appealed to the SBE in conformity with the California Revenue and Taxation Code. On April 10, 1997, the SBE sustained the FTB's decision. On May 5, 1997 Plaintiffs

filed a Petition for Rehearing the Appeal before the StateBoard of Equalization, and on June 26, 1997 that Petition was denied. Plaintiffs then filed this action in Federal District Court.

II. Legal Standard

Dismissal is appropriate under Rule 12(b) (1) when the district court lacks subject matter jurisdiction over the claim. Dismissal under Rule 12(b)(6) for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-45 (1957); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

III. Discussion

The Tax Injunction Act provides "[t]he district court shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. The act applies not only to suits for injunctive relief, but also to declaratory actions, Nat'l Private Truck

Council v. Okl. Tax Comm'n, 115 S.Ct. 2351, 2354 (1995), and suits for tax refunds, Marvin F. Poer and Co. v. Alameda, 725 F.2d 1234, 1236 (9th Cir. 1984). Thus, Plaintiffs' claims for relief must be dismissed unless no "plain, speedy, and efficient remedy" is available in State court. The Supreme Court has directed, however, that the inadequate State remedy exception be narrowly construed, and that such a remedy is adequate if it provides a mechanism for obtaining a refund even if declaratory relief is not available. California v. Grace Brethren Church, 457 U.S. 393, 413 (1982).

California State law provides state court procedures for corrections, cancellations, and refunds of illegal or unconstitutionally assessed or collected taxes. Cal. Rev. & Tax. Code §1401 et seq.

Plaintiff states that because he has already been before the Franchise Tax Board and the Board of Equalization there is no remedy at the state level. However, State law permits a taxpayer to seek relief in the superior court in the county in which property is located. Cal. Rev. & Tax. Code §4808. Plaintiff has not sought relief in State court, and that remedy is still available to him. In addition, questions regarding the constitutionality of taxes may also be properly addressed to State courts. In light of the foregoing, it is clear that Plaintiffs

have an adequate State court remedy, and their claims are therefore barred by the Tax Injunction Act.

IT IS SO ORDERED.

DATED: 11/24/97

/s/ Spencer Williams
SPENCER WILLIAMS
United States District Judge